Office-Supreme Court, U.S.
FILED
AUG 25 1965
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 51

EDDIE J. HICKS,

Petitioner,

vs.

DISTRICT OF COLUMBIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinion Below Reported

The opinion of the District of Columbia Court of Appeals, entered on February 5, 1964, affirming petitioner's conviction, is unofficially reported at 197 A.2d 154.

Statement of Jurisdiction

This Court has jurisdiction of the present case under 28 U.S.C. § 1651(a). See *House* v. *Mayo*, 324 U.S. 42 (1945); *Holiday* v. *Johnson*, 313 U.S. 342 (1941); *In re 620 Church St. Bldg. Corp.*, 299 U.S. 24 (1936). Section 1651(a) provides that the Supreme Court "may issue all writs necessary or appropriate in aid of" its jurisdiction. Since

the statute under which petitioner was convicted is unconstitutional on its face, the trial court had no authority to enter the judgment of conviction nor did the Court of Appeals have discretion to deny petitioner's petition for allowance of an appeal where the statute's unconstitutionality was the only grounds urged for reversal. The common-law writ of certiorari under 28 U.S.C. § 1651(a) may be employed to review such a case. *De Beers Consol. Mines* v. *United States,* 325 U.S. 212, 217 (1945). The statute (28 U.S.C. § 1254) providing for review on a writ of certiorari of cases in the Courts of Appeals arguably may not be directly applicable because of the denial by the United States Court of Appeals of petitioner's petition for allowance of an appeal. Compare *Ferguson* v. *District of Columbia,* 270 U.S. 633 (1926). Nonetheless, the action of the United States Court of Appeals properly may be reviewed upon a writ of certiorari under the general power conferred by 28 U.S.C. § 1651(a) since it lacked discretion to deny petitioner's appeal.

The timeliness of the petition for certiorari to the United States Court of Appeals for the District of Columbia Circuit is governed by Rule 22(2) of the Rules of this Court. On October 26, 1964, the United States Court of Appeals for the District of Columbia Circuit entered an order vacating and reentering its order of June 15, 1964. That order denied a petition for reconsideration *en banc* of the order of a three-judge panel of the Court of Appeals entered on April 28, 1964, which denied petitioner's then petition for the allowance of an appeal. The petition for writ of certiorari was filed on November 25, 1964. The filing of the petition for writ of certiorari was timely. *Heflin* v. *United States,* 358 U.S. 415 (1959).

Constitutional Provisions and Statutes Involved

United States Constitution, Amendment V: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The statute principally involved is Section 22-3302(3) of the District of Columbia Code (1961 Ed.), which provides that:

> "The following classes of persons shall be deemed vagrants in the District of Columbia:
>
> • • • • •
>
> "(3) Any person leading an immoral or profligate life who has no lawful employment and who has no lawful means of support realized from a lawful occupation or source."

The full text of D. C. Code Section 22-3302 and other relevant statutes is set out in Appendix D hereto.

Question Presented

Whether D. C. Code Section 22-3302(3) (1961 Ed.) which defines the crime of vagrancy as "leading an immoral or profligate life" is void under the Due Process Clause of the Fifth Amendment because the words which purport to define the prohibited conduct are vague and indefinite.

Statement of the Case

This case originated with petitioner's arrest for vagrancy in the park at Dupont Circle in the city of Washington in the early afternoon of June 12, 1963 (R. 1, 3). That same

afternoon petitioner was tried in the District of Columbia Court of General Sessions, Criminal Division, on an information charging him with vagrancy under D. C. Code, Section 22-3302, subsection 3 (hereinafter "Subsection 3") (R. 3). Petitioner pleaded not guilty but was convicted as charged by a judge of that court who sat without a jury (R. 4). Sentencing was set down for the next day and petitioner was remanded to jail in lieu of $300 bond (R. 1). On the following day (June 13), petitioner was again brought before the trial court. The same judge, exercising his discretion under D. C. Code, Section 22-3304, suspended the imposition of sentencing and released petitioner upon his personal recognizance or bond (R. 4, 1).*

By means of a motion in arrest of judgment and for a new trial (R. 5), petitioner objected that his trial and conviction could not stand because of the unconstitutional vagueness of the penal statute—Subsection 3—under which the proceedings against him were had. The trial court overruled petitioner's constitutional objection and denied the motions (R. 4, 8). An appeal was taken to the District of Columbia Court of Appeals which, on February 5, 1964, affirmed the conviction and rejected petitioner's constitutional objections. *Hicks* v. *District of Columbia,* 197 A.2d 154 (D.C. App. 1964) (R. 12-14).

On February 21, 1964, petitioner's motion for rehearing in the District of Columbia Court of Appeals was denied

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* Under such a sentence, the accused is customarily released but may be brought before the sentencing court at a later date and receive the imposition of sentence. Under D.C. CODE § 22-3304 (1961 Ed.), sentence of a fine of up to $300 and/or a term of imprisonment of up to 90 days may be imposed. There is no right to a jury trial in a vagrancy prosecution since the offense is considered "minor." See District of Columbia v. Clawans, 300 U.S. 617 (1937).

(R. 15) and on March 2, 1964, petition for allowance of an appeal was made to the United States Court of Appeals for the District of Columbia Circuit (R. 16). On April 28, 1964, a three-judge panel of the United States Court of Appeals, voting 2-1,* denied the petition for allowance of an appeal (R. 17). A petition for reconsideration *en banc* was denied on June 15, 1964, by a vote of 6-3** (R. 28-29). By the unanimous order of the United States Court of Appeals, the order of June 15, 1964, was vacated and reentered as of October 26, 1964 (R. 33-34).

On November 25, 1964, petitioner filed in this Court his motion for leave to proceed in forma pauperis and his petition for a writ of certiorari to the United States Court of Appeals. They were granted on February 1, 1965 (R. 36). 379 U.S. 998.

Summary of Argument

Petitioner was arrested and convicted under Subsection 3 of the District of Columbia vagrancy statute which provides that a vagrant is "any person leading an *immoral or profligate* life." (Emphasis supplied.) Another section of the vagrancy law provides that other elements of the offense which relate to the defendant's economic and employment status are not part of the government's burden of proof. For the purposes of this case, these elements thus may be ignored. All that the government need prove in order to

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* Circuit Judges Wilbur K. Miller and Danaher voted to deny the petition. Judge Fahy voted to allow it.

** Chief Circuit Judge Bazelon and Circuit Judges Fahy and Wright voted to grant the petition for reconsideration *en banc*. The other members of the court voted to deny it.

obtain a conviction is, therefore, that the defendant has been leading an "immoral or profligate" life.

It is the position of petitioner that Subsection 3 is unconstitutionally vague and thus that his conviction under it must be set aside.

The background and sources of the District vagrancy law are found in portions of the poor laws of fourteenth-century England. These statutes were notable for their inhumaneness and were enacted in order to hold the serfs to the land by prohibiting their wandering in search of better employment. In time, however, the vagrancy laws came to be viewed more as a means of controlling a class of potential criminals than as a regulation of the wandering of an economic class. Finally, in nineteenth-century England the concept triumphed that a mere status or condition should not be punishable as a crime. Present-day enforcemen in England is directed only against specific acts.

The District of Columbia vagrancy law and those of most of the States, however, still follow the medieval models. But the age of its historical antecedents cannot save a statute which otherwise is unconstitutionally vague, as Subsection 3 obviously is. *Winters* v. *New York*, 333 U.S. 507 (1948); *Edwards* v. *California*, 314 U.S. 160 (1941).

A survey of the vagrancy legislation of each of the States shows that eight jurisdictions in addition to the District of Columbia have provisions very similar to Subsection 3. Precision of language in vagrancy legislation has been intentionally avoided and, as is shown by the circumstances of the recent enactment of new vagrancy legislation in Minnesota, there is still an inclination to forego any significant attempt to make this language more precise.

The legislative history of the District of Columbia vagrancy statute shows a disquieting disregard for precision of language. The earliest statute was the Act of 1892 which, as amended in 1898, included "all suspicious persons" as vagrants. This was declared unconstitutional in *Stoutenburgh* v. *Frazier,* 16 App. D.C. 229 (1900). In fact, from 1892 until the 1941 revision of the vagrancy laws, all five reported decisions involving these laws resulted in reversals, although only the *Stoutenburgh* decision was based on constitutional grounds. The 1941 revision by Congress produced the present wording of Subsection 3. But the revision became law only after a presidential veto had prevented enactment of an earlier version because of its inclusion of the "idle" as a class of vagrants.

As an aid to understanding Subsection 3, resort has been had to the District of Columbia cases construing it. The rule that penal statutes are to be strictly construed is of little benefit since this only applies when there are a reasonably finite number of possible constructions from which to choose. And the dictionary definition given to the words "immoral" and "profligate" in *Davenport* v. *District of Columbia,* 61 A.2d 486, 488 (D.C. Munic. App. 1948), defines an offense of infinite amplitude. The "limitation" found in other cases that the offense of vagrancy consists of a "pattern of iniquity" rather than an isolated occurrence serves only to compound the uncertainty of Subsection 3 since the prosecution can rely upon the cumulative effect of impressions derived from years of observation. The defendant must be prepared to defend every action and trait of character displayed during his recent past. The statement that the purpose of the vagrancy statute is to "prevent crime" is not helpful as a guide to the language of Subsection 3 since neither judges, police nor citizens can

know with certainty whether or to what extent a particular crime-causing factor amounts to leading an "immoral or profligate" life.

The unlimited breadth of Subsection 3 is condemned by the void-for-vagueness doctrine developed by this Court as an application of the principles of the Due Process Clause. As concisely stated by the Court in *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926), "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application, violates the first essential of due process of law . . . ." Moreover, as stated in *Winters* v. *New York*, 333 U.S. 507, 515 (1948), "the standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. . . ."

Several cases decided by this Court bear directly upon the asserted vagueness of the words "immoral or profligate" in Subsection 3. In *Musser* v. *Utah*, 333 U.S. 95 (1948), the majority of the Court stated that a statute prohibiting a conspiracy to do any act "injurious . . . to public morals," "standing by itself, . . . would seem to be warrant for conviction for agreement to do almost any act which a judge or jury might find at the moment contrary to his or its notions of what was good for . . . morals . . . . [The Court would inquire] whether the statute attempts to cover so much that it effectively covers nothing." On remand, the state supreme court answered this inquiry in the affirmative. Similarly, in *Superior Films, Inc.* v. *Department of Educ.*, 346 U.S. 587 (1954) (per curiam) and the companion case of *Commercial Pictures Corp.* v. *Regents*, the Court struck down as unconstitutional Ohio and New York statutes which attempted to define the al-

lowable area of censorship in terms of morality. The cases were decided solely on the authority of *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952), which had invalidated a similar statutory use of the word "sacrilegious." Finally, the dissenting opinion of Justice Frankfurter (with Justices Jackson and Burton) in *Winters* v. *New York*, 333 U.S. 507, 520 (1948), and of Justices Black and Douglas in *Edelman* v. *California*, 344 U.S. 357, 362 (1953), have unequivocally, and without conflict with the majority of the Court in those cases, underscored the unconstitutional vagueness of vagrancy laws such as Subsection 3.

"Immoral or profligate life" is such a broadly worded provision that it could well serve as the legal justification for a variety of police abuses, primarily arrest for suspicion. Within the framework of the dictionary definition supplied by the *Davenport* case, *supra*, there is an endless variety of oppressive and illegal, but undeniably real, abuses to which Subsection 3 could give rise. It is submitted that the District of Columbia cannot give the necessary assurance that they would not occur.

Subsection 3 also is invalid because it is broad enough to permit the punishment under it of acts which are protected by the First Amendment. Examples abound of constitutionally protected activities which could well be within its ambit. And Congress was not ignorant of such possibilities as is shown by their inclusion of Section 22-3306 in the District of Columbia vagrancy statutes providing that nothing therein "shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right to picket." Finally, the administrative application of Subsection 3 by the police and its judicial application by the courts require that policeman and judge apply the dictates of their own conscience to the conduct of others

—an exercise of governmental authority which violates the Non-Establishment and Free Exercise of Religion clauses of the First Amendment.

Because of its vagueness and indefiniteness, Subsection 3 is unconstitutional; because of its unconstitutionality, petitioner's conviction under it cannot stand.

ARGUMENT

The Subsection of the Vagrancy Statute (Subsection 22-3302(3)) Under Which Petitioner Was Tried and Convicted Is Unconstitutional Because It Is Too Vague and Indefinite To Provide Sufficient Guidance to Citizens, the Police or the Courts

The section of the vagrancy statute (D.C. Code, Section 22-3302(3) (1961 Ed.)) under which petitioner was arrested, charged, convicted and sentenced, provides in relevant part that:

> "The following classes of persons shall be deemed vagrants in the District of Columbia:
>
> • • • • •
>
> "(3) Any person leading an immoral or profligate life who has no lawful employment and who has no lawful means of support realized from a lawful occupation or source."

Section 22-3303 of the Code further provides that in all prosecutions under Subsection 3 "the burden of proof shall be upon the defendant to show that he has lawful employment or has lawful means of support realized from a lawful occupation or source." This means that in order to make out a prima facie case of vagrancy under Subsection

3 the prosecution need prove only that the defendant was leading "an immoral or profligate life." * If the trial court believes the prosecution's testimony (as it almost invariably will) and thus is satisfied that the defendant has been leading "an immoral or profligate life," and if the defendant is unable to establish that he is lawfully employed or that he has some other lawful source of income, then the defendant can be found guilty and sentenced to pay a fine of up to $300 and/or to serve a term of imprisonment of up to 90 days (D.C. CODE, Section 22-3304 (1961 Ed.)).

As will be fully shown below, this statutory scheme, as written and as construed by the courts, is unconstitutional. Since this is so and since this unconstitutional statute was the sole foundation for petitioner's conviction, it must be set aside.

A. THE HISTORY OF THE VAGRANCY STATUTE DEMONSTRATES ITS PURPOSEFUL IMPRECISION

1) *The Common-Law Inheritance*

Statutes, like people, often can be better understood when viewed in the light of their background. An attempt has, therefore, been made to set out briefly the background of Subsection 3. It will be seen from this history that Sub-

* See Walker v. District of Columbia, 196 A.2d 92, 93 (D.C. App. 1963); Baker v. District of Columbia, 184 A.2d 198, 200 (D.C. Munic. App. 1962); Williams v. District of Columbia, 65 A.2d 924, 925 (D.C. Munic. App. 1949); Clark v. District of Columbia, 34 A.2d 711, 714 (D.C. Munic. App. 1943). The imposition on the defendant of the burden of showing lawful employment or income was held constitutional in Rogers v. District of Columbia, 31 A.2d 649, 652-53 (D.C. Munic. App. 1943). The legislative history of the District of Columbia vagrancy statute makes it quite clear that imposition of this burden was the principal purpose of the legislation. See H.R. REP. No. 1248, 77th Cong., 1st Sess. (1941).

section 3 shares an ancient but tarnished legacy. Because of the peculiar purposes which motivated the enactment of vagrancy laws and because of the class of persons against whom they were directed, precision of language was disregarded or, indeed, avoided by design.*

The sources of vagrancy statutes such as Subsection 3 are to be found in the poor laws of medieval and later England, ". . . those evil statutes of the vile Tutors and sinful Stuarts." (Chief Judge Millard dissenting in *Grenz* v. *State*, 26 Wash. 2d 764, 175 P.2d 633, 640 (1946), *appeal dismissed for failure to file jurisdictional statement*, 332 U.S. 748 (1947).) Under these laws of six centuries ago, both the prices of food and clothing and the wages which could be paid to workmen were regulated. The first thorough-going regulation were the Statutes of Laborers, 23 Edw. 3, c. 1 (1349) and 25 Edw. 3, c. 1 (1350), which confined the laboring population to stated areas within which they could live and fixed wages at specific maximum rates. These were the first laws to make wandering a crime. They were followed by a long series of acts of Parliament suppressing the poor still further in an effort to perpetuate the system of villainage and serfdom. 3 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 204 (1883). These laws reached their nadir in the Act of 27 Hen. 8, c. 25 (1535),

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* Good sketches of the history of vagrancy legislation, including citations to older studies and authorities, can be found in 3 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 266-75 (1883); Dubin & Robinson, *The Vagrancy Concept Reconsidered; Problems and Abuses of Status Criminality*, 37 N.Y.U.L. REV. 102, 104-107 (1962); Lisle, *Vagrancy Laws: Its Faults and Their Remedy*, 5 J. OF CRIM. L. & CRIMINOLOGY 498-504 (1915); Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts In Need of Revision*, 48 CALIF. L. REV. 557-61 (1960); Ledwith v. Roberts [1937], 1 K.B. 232, 245, 254, 267 (C.A. 1936). Much of the following has been taken from these sources without further citation.

which imposed the penalty of execution as a felon upon a person three times convicted of vagrancy.

After a time the emphasis of vagrancy legislation passed from viewing the class against which it was directed as a mass of working chattels which had to be kept from wandering to viewing them as the primary source of potential criminals. This view can be seen in the Slavery Act, 1 Edw. 6, c. 3 (1547), which repealed all the previous poor laws because they were not sufficiently severe. 3 STEPHEN, *op. cit. supra* at 271. Thereafter, the first offense for vagrancy incurred branding with a "V" and being bound in slavery for two years to whomever sought the vagrant's labor. His master was instructed to keep him on bread and water and to refuse him meat. For the second offense, the vagrant was branded on the cheek with an "S" and made a slave for life. The apparent intent of these brandings was to make the offendor easily identifiable. The third offense was punished by the gallows.

In England, it was not until the Vagrancy Act of 1824, 5 Geo. 4, c. 83, that the social purposes of the poor laws and the penal purposes of the vagrancy laws were effectively separated. By 1871, the prevention of crime by the proscription of specifically defined acts of conduct had replaced completely the antiquated concept of punishment based on economic status (The Prevention of Crimes Act, 1871, 34 & 35 Vict., c. 112, § 15). Under the law as it is at present in England, "vagrancy" is no longer anything but a nonsubstantive appellation which by itself describes no punishable offense. At least since *Ledwith* v. *Roberts*, [1937] 1 K.B. 232 (C.A. 1936), vagrancy has been brought into line with the basic philosophy of the criminal law: only acts specifically defined as criminal may be punished.

Although no specific medieval prototype has been found, in conception and application Subsection 3 has in many ways perpetuated the worst features of the vagrancy legislation of the middle ages. And it cannot be supposed that the antiquity of the historical precedents of Subsection 3 excuses whatever injustice may inhere in the statute. The aged proscriptions which formed the basis for Subsection 3 and the rest of the District's vagrancy provisions discredit rather than validate their modern counterparts. They certainly lend no support to them. And so it was held in *Stoutenburgh* v. *Frazier,* 16 App. D.C. 229 (1900). The Court of Appeals for the District of Columbia was there presented with an earlier vagrancy statute which classified as criminals "all suspicious persons." The District attempted to save the statute by showing that its language was similar to that of an early English statute. In holding the statute unconstitutional, the court rejected this contention:

> "In the legislation of England, in regard to the police of that Kingdom, we find a great variety of regulations prescribed from time to time, dating back to the earlier reigns and all those in succession; down to modern times, to meet the requirements of the then existing state of society. But much of that legislation has become obsolete, and, from its severe restrictions upon the liberties of the people, and the cruel and unnatural punishments inflicted, it has long since ceased to be applicable to modern society, and could not at this day be tolerated." (16 App. D.C. at 236)

To the same effect was the decision of this Court in *Winters* v. *New York,* 333 U.S. 507 (1948), where the fact that the statute was sixty years old failed to save it

from an otherwise well-founded constitutional attack. Similarly, in *Edwards* v. *California,* 314 U.S. 160 (1941), this Court held unconstitutional, despite the asserted sanction of Elizabethan poor laws, a California statute which prohibited the importing of indigents into the state.

The specific considerations which have caused courts to resist efforts to justify unconstitutional laws by their hoary antecedents has been well and recently stated in the decision of a Pennsylvania court of intermediate appellate jurisdiction. In *Commonwealth* v. *Franklin,* 172 Pa. Super. 152, 92 A.2d 272 (1952), a Pennsylvania practice of requiring bond from persons acquitted of criminal charges which rested upon almost 600 years of precedent was overthrown on the ground, *inter alia,* of the unconstitutional vagueness of the phrase "not of good fame." With respect to the age of the practice, the court stated:

> "From our consideration of this matter we are of the opinion that the only possible basis for conceding contemporary validity to this 1360 statute is its age and the age of certain ill-considered text comments, a variation of the supposition that 'whatever is is right.' We choose, however, to conclude that civil rights are not lost by historical default; that error compounded by error remains nonetheless error. Age alone certainly does not render a statute invalid. . . . Conversely, however, age alone cannot insulate a statute from attack when in different time and social context and in different constitutional milieu it is in irreconcilable conflict with concepts of individual rights and criminal law." (92 A.2d at 291)

So too, even though Subsection 3 might have been defensible during the middle ages as a necessary preservative for the then existing social and legal order, still if it

is to have continuing validity it must comport with contemporary standards of constitutional precision.

2) *The Present Statutory Situation in the United States*

Unfortunately, the vagrancy laws in most of the jurisdictions in the United States still follow the early English models in that an often ill-defined status is punished because a supposed predilection to criminality has been attached to that status by legislative fiat. See Lacey, *Vagrancy and Other Crimes of Personal Condition,* 66 HARV. L. REV. 1203, 1206 (1953). The same must be said of most portions of the District of Columbia statute. See Douglas, *Vagrancy and Arrest on Suspicion,* 70 YALE L.J. 1, 6 (1960). Most authorities who have studied the question entertain considerable doubt that this supposed predilection to criminality actually exists and the available studies, although not conclusive, indicate that it does not. See Foote, *Vagrancy-Type Law and Its Administration,* 104 U. PA. L. REV. 603, 626-28 (1956); and the authorities marshalled in Dubin & Robinson, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality,* 37 N.Y.U.L. REV. 102, 121 (1962).

Despite the severe criticism which has been leveled against the traditional philosophy and wording of vagrancy legislation, however, a review of the vagrancy or vagrancy-type legislation in the fifty States of the Union* shows that indefinite language is the hallmark of vagrancy statutes. In fact, eight states—Alabama, Colorado, Georgia, Mississippi, North Carolina, South Dakota, Texas and Wyo-

* The listing in Lacey, *Vagrancy and Other Crimes of Personal Condition,* 66 HARV. L. REV. 1203, 1207 n.17 *et seq.* (1953), must be used with caution as many of the cited provisions have been renumbered, revised, or, more rarely, repealed. A current listing of the relevant statutes appears in Appendix A hereto.

ming—still retain in their statutory definitions of vagrancy a provision very similar to Subsection 3 and in most cases indistinguishable from it. The relevant portions of these statutes are set out in the margin.* It will be seen that the provisions of seven states define vagrants as those who lead an "idle, immoral or profligate" life, while Wyoming's statute speaks of the "immoral or worthless" life. Each of the statutes, as with Subsection 3, apparently exempts those dissipates who possess lawful means of support or lawful employment. And, as is the case with Subsection 3 in the District of Columbia Code, two of these states (Alabama and South Dakota) require by statute that the accused

* ALABAMA: "The following described persons are vagrants: . . . (2) Any person leading an idle, immoral or profligate life, who has no property sufficient for his support, and who is able to work and does not work. . . ." (ALA. CODE tit. 14, § 437(2) (1940)).

COLORADO: "Any person able to work and support himself in some honest and respectable calling who shall be found . . . leading an idle, immoral or profligate course of life . . . shall be deemed a vagrant . . . ." (COLO. REV. STAT. ANN. § 40-8-19 (1963)).

GEORGIA: "Vagrants are— . . . 2. Persons leading an idle, immoral, or profligate life, who have no property to support them and who are able to work and do not work." (GA. CODE ANN. § 26-7001(2) (1935)).

MISSISSIPPI: "The following persons are and shall be punished as vagrants, viz.: . . . (b) Persons leading an idle, immoral or profligate life, who have no property to support them, and who are able to work and do not work." (MISS. CODE ANN. § 2666 (1942)).

NORTH CAROLINA: "If any person shall come within any of the following classes, he shall be deemed a vagrant . . . 2. Persons leading an idle, immoral or profligate life, who have no property to support them and who are able to work and do not work." (N.C. GEN. STAT. § 14-336(2) (1953)).

SOUTH DAKOTA: "A vagrant is an idle person, having no legitimate means of support, who does not seek or desire lawful employment, and who subsists through charity of others or by unlawful means. Whenever it shall, in a prosecution under this

discharge the burden of showing that he possesses lawful means of support or is lawfully employed.*

It is apparent then that the problems presented by the broad and general sweep of the language of Subsection 3 are not problems peculiar to the District of Columbia. It is true that certain states—including California, Illinois and Maryland (see Appendix A hereto)—recently have taken constructive steps toward eliminating these problems. But other states have done nothing or, as in one known instance, have intentionally perpetuated these problems.

The one instance where the problems of wording a vagrancy statute were acknowledged but left unsolved occurred in Minnesota. In 1963, the Advisory Committee to the Interim Commission on Juvenile Delinquency, Adult Crime and Corrections reported to the Legislature of the State of Minnesota a recommended criminal code. The present Section 609.725 of the Minnesota Statutes, the pro-

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section, be shown that any person who is able to work: . . . (2) Leads an idle, immoral, or profligate life and does not work; . . . it shall constitute a prima facie presumption that such person is a vagrant as defined in this section." (S. D. CODE § 13.1324(2) (1939)).

TEXAS: "The following persons are and shall be punished as vagrants, viz.: . . . (2) Persons leading an idle, immoral or profligate life, who have no property to support them, and who are able to work and do not work." (TEX. PEN. CODE ANN. art. 607(2) (Vernon 1952)).

WYOMING: "Any person able to support himself in any respectable calling, who shall be found within the limits of this state without any visible means of support, and living an immoral or worthless life, shall be deemed a vagrant . . . ." (WYO. STAT. ANN. § 6-221 (1957)).

* See ALA. CODE tit. 14, § 439 (1940) (prosecution need show only "that such defendant is leading an idle, immoral, or profligate life, and that such defendant is able to work . . . "). The same is apparently the meaning of S. D. CODE § 13.1424 (1939), quoted in the preceding footnote, although no reported case has yet construed this provision.

vision defining vagrancy, was part of the recommended Code and became law without change. (Minn. Laws 1963, c. 753, Criminal Code of 1963).* The comment on the vagrancy section by the distinguished Advisory Committee contains an extraordinarily candid and informative statement of the purpose of that section. Though of some length, the comment merits quotation in full:

> "Ever since the breakdown of the feudal system, Anglo-American society appears to have had its residue of persons not fitting into the social structure. Though able, they do not work, do not want to work, have no family ties, belong to no neighborhood, live on what is discarded by others or by theft or begging, and often move from one locality to another. They are the inhabitants of skid row.
>
> "The laws on vagrancy have been developed to deal with this class of persons. Such laws have existed from about the 14th century and a peculiar characteristic of them has been that they punish being such a person rather than an act committed by him. Hence such phrases as 'lives in idleness,' 'without visible means of support,' 'unable to give a good account of himself,' etc.

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* The definitions of "vagrants" as enacted in MINN. STAT. ANN. § 609.725 (West 1964) are:

> "(1) A person, with ability to work, who is without lawful means of support, does not seek employment, and is not under 18 years of age; or
>
> "(2) A person found in or loitering near any structure, vehicle, or private grounds who is there without the consent of the owner and is unable to account for his presence; or
>
> "(3) A prostitute who loiters on the streets or in a public place or in a place open to the public with intent to solicit for immoral purposes; or
>
> "(4) A person who derives his support in whole or in part from begging or as a fortune teller or similar imposter."

"This offense has usually been made a misdemeanor. Since these persons seldom can pay fines, punishment has consisted in confinement in the workhouse, frequently suspended on condition of getting out of town.

"For the police, such laws have several advantages:

"(1) Testimony that the defendant has been observed loitering, gives a confused account of himself, and is not working, is sufficient for conviction.

"(2) It permits arrest for this offense when the real objective is to get information about other and more serious crimes.

"(3) It permits pressure on this group to keep them from getting too large or too obnoxious without the necessity of waiting until evidence of a specific crime is obtained.

"(4) The defendant may be suspected of some offense which cannot be proved: the charge of vagrancy permits punishment nevertheless.

"It has been said that without this offense the police would be at a serious handicap in dealing with this class of persons.

"See 23 California L. Rev. 616, which is a reply to 'Who is a vagrant in California?' by a municipal judge.

"Perkins, The Vagrancy Concept, 1958, 9 Hastings L. Jr. 237, 252, states:

"'In metropolitan centers . . . the vagrancy law is one of the most effective weapons in the arsenal of law enforcement, and if the officer's use of this weapon should be seriously impaired, the security of the citizen would be grievously weakened.'

"Nevertheless, the use of the vagrancy laws is subject to serious abuse by the police. These laws are usually couched in broad terms and conviction will usually follow on testimony of the police officer stated in equally broad terms. The defendants are usually ignorant, unable effectively to explain their position if they have any, are unable to employ counsel and are, therefore, pretty much at the mercy of the police.

"Courts, no doubt, feel under some compulsion to accept the testimony of police or risk permitting these individuals to get out of hand.

"This is undoubtedly a crude device for getting at a very deep social problem and consists of little more than attempts at repression rather than solution.

"It is believed that a program leading to a more effective solution cannot be undertaken in this revision.

"The alternative is, therefore, to state the law on the premises of the present statutes, confining them to specified limits and stating them with as much clarity as the subject permits." (Quoted in MINN. STATS. ANN. vol. 40A, ff. § 609.725, at 68-69 (1964).)

In other words, vagrancy statutes in the main are designedly written in broad and all-inclusive terms so as to facilitate the conviction of vaguely undesirable persons who have committed no crime—or at least cannot be convicted of a specific crime in the regular manner with proper proof—but who for some reason have aroused the suspicions or annoyed attention of the police. Such purposes would appear to be well served by Subsection 3's blanket condemnation of "leading an immoral or profligate life." And, as will be seen, the legislative history pertaining specifically to Subsection 3 rouses the strong suspicion that Congress in-

tended to serve these purposes through the use of imprecise language in Subsection 3 and throughout the vagrancy statute.

3) *Legislative History of the District's Vagrancy Statute*

Turning then to vagrancy legislation specifically applicable to the District of Columbia, one encounters the earliest statute in the Act of July 29, 1892, ch. 320, 27 Stat. 323. In separate phrases, that law punished as criminal such persons as those "who have no visible means of support" or who "lead a notoriously lewd or lascivious course of life" and included "persons who are likely to become chargeable to the District of Columbia as paupers." The statute was amended by the Act of July 8, 1898, ch. 638, 30 Stat. 723, which was most noteworthy for its inclusion of "all suspicious persons" as vagrants. The inclusion of "all suspicious persons" was immediately challenged and was struck down as void and unconstitutional in the landmark case of *Stoutenburgh* v. *Frazier*, 16 App. D.C. 229 (1900). In his opinion for the court in the *Stoutenburgh* case, Chief Justice Alvey was forced to conclude that the District of Columbia vagrancy law was "more arbitrary than the English statute" of 1824 (16 App. D.C. at 237). Sixty-five years after the Chief Justice wrote, the main force of this criticism is, unhappily, still applicable to the District vagrancy law.

Congress responded to the *Stoutenburgh* decision by replacing the old statute with an act which is found as a rider to the D.C. Appropriation Act for 1909, ch. 250, 35 Stat. 711. The general tenor of the Act is made clear by its initial definition of "vagrants" as "idle persons who, not having visible means of support, live without lawful em-

ployment." Having summarily disposed of the unemployed in general, the Act proceeded to another category:

> "All persons leading an idle, immoral, or profligate life who have no property to support them and who are able of body to work and do not work, including all able-bodied persons without other visible means of support who shall live in idleness upon the wages or earnings of their mother, wife, or minor child or children."

This 1909 legislation marked the debut of "idle, immoral, or profligate life" as the description of a criminal status in the District.

In dealing with prosecutions brought under the statutes of 1892, 1898 and 1909, the courts of the District of Columbia apparently were quite reluctant to permit the punishment of defendants under them. Every one of the five reported cases under the Acts of 1898 and 1909 resulted in a reversal. *Stoutenburgh* v. *Frazier*, 16 App. D.C. 229 (1900); *Fields* v. *District of Columbia*, 26 App. D.C. 70 (1905); *Fleming* v. *District of Columbia*, 34 App. D.C. 5 (1909); *Lewis* v. *District of Columbia*, 51 App. D.C. 221 (1922); and *Rose* v. *District of Columbia*, 51 App. D.C. 222 (1922). Despite the glaring defects in the vagrancy law, the Act of 1909 remained in force without amendment until 1941. See D.C. Code tit. 6, § 291 (1930 Ed.); D.C. Code § 22-3301 (1941 Ed.).

On July 30, 1941, a bill to redefine the crime of vagrancy in the District of Columbia was introduced in the House of Representatives. The complete text of the bill is set out in 87 Cong. Rec. 7081 (1941). The bill contained the present wording of Subsection 3 which was not altered at any point during the legislative process. The bill also defined a vagrant as, among other things, "any able-bodied person

who *lives in idleness"* upon the charity of another, and as "any person *leading an idle life"* who had no lawful source of income or employment and who failed to give "a good account of himself." (Emphasis supplied.) Apparently believing that this and other language in the vagrancy bill posed a threat to the legitimate activities of labor unions, the sponsors of the bill tacked on the proviso that "nothing in this act shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right to picket." (87 CONG. REC. 7081)*

The bill was enacted in this form by both Houses of Congress and sent to the President for his signature. 87 CONG. REC. 7494. President Roosevelt vetoed the bill, however, on the grounds that the phraseology used in the bill ". . . does not conform with accepted standards of legislative practice as a definition of a criminal offense. . . ." Veto Message of the President, 87 CONG. REC. 7576 (1941). The matter was considered further by Congress and a new bill was passed which deleted the "idle" as a class of vagrants. The Act became law and today it is found in Sections 22-3302 to 22-3306 of the District of Columbia Code.

4) *Judicial Construction of Subsection 3*

The legislature and the executive having acted, control over the administration of Subsection 3 passed mainly to the courts of the District of Columbia. And, while "judicial safeguards do not neutralize the vice of a vague law," *Baggett* v. *Bullitt,* 377 U.S. 360, 373 (1964), nonetheless, it has also been stated on occasion that a narrowing judicial

* The proviso was ultimately enacted as part of the vagrancy statute even though the "idleness" language was excised before the statutes became law. The proviso now appears as D.C. CODE § 22-3306 (1961 Ed.). See discussion at 48-49, *infra.*

construction may save an otherwise indefinite statute "as so construed." See, *e.g., United States* v. *Alford,* 274 U.S. 264 (1929); see also *Cramp* v. *Board of Pub. Instruction,* 368 U.S. 278, 285 (1961), and cases cited. But even if the judicial glosses on the text of Subsection 3 are considered in testing its constitutionality, they would not save it. They have done little, if anything, to impart the minimum of precision which due process requires and in some instances have made the subsection even looser.

Narrow Construction. We start, of course, with the proposition that "the vagrancy statute, because it defines a crime, must be construed narrowly in favor of the defendant. . . ." *Harris* v. *District of Columbia,* 251 F.2d 913, 914 (D.C. Cir. 1958), *reversing* 132 A.2d 152 (D.C. Munic. App. 1957). But this "canon of construction" applies to all penal statutes and it has no special utility when applied to Subsection 3. It is particularly inapposite when the inquiry relates to the statute's vagueness, for here the question is not whether Subsection 3 should bear one or the other of two possible constructions but whether it can be meaningfully construed at all. The words of Subsection 3 are so indefinite that one can never confidently predict whether a particular act will or will not be held to be encompassed within them. This is especially true in light of the broad and all-inclusive fashion in which the words of Subsection 3 have been defined.

Dictionary Definition. On occasion, resort has been had to dictionary definitions in an attempt to ascertain whether a phrase has a commonly understood meaning. For example, see the prodigious collection of dictionary definitions compiled in the concurring opinion and appendix of Justice Frankfurter in *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 507 at 523-28, 533-40 (1952). A modest survey

has been conducted with respect to the words "immoral" and "profligate" and the dictionary entries consulted are listed in Appendix B hereto. These entries, which are believed to be representative, comport with what was said in *Davenport* v. *District of Columbia*, 61 A.2d 486, 488 (D.C. Munic. App. 1948). In the opinion in the *Davenport* case, the court attempted to assign meaning to the words "immoral" and "profligate" by referring to the definitions given in the second edition of WEBSTER'S NEW INTERNATIONAL DICTIONARY and in *Schuman* v. *Pickert*, 277 Mich. 225, 269 N.W. 152, 154 (1936), from which the court in part quoted:

> "Webster's Dictionary defines 'profligate' as 'completely given up to dissipation and licentiousness; broken down in morals and decency.' It has been said that '"Immorality" is not necessarily confined to matters sexual in their nature; it may be that which is contra bonos mores; or not moral, inconsistent with rectitude, purity, or good morals; contrary to conscience or moral law; wicked; vicious; licentious, as an immoral man or deed. Its synonyms are: Corrupt, indecent, depraved, dissolute; and its antonyms are: Decent, upright, good, right . . . .' We have no doubt that the evidence furnished ample support for the finding of the trial court that Davenport came within those definitions and thus was leading an immoral or profligate life." (Footnotes omitted.)

When it is considered that the court was construing the words of a statute which can be and is used daily to send persons to jail for terms as long as three months, it is difficult to believe that this definition could bear analysis. Analysis, not incidentally, was not given that definition by the Court of Appeals in its opinion below which stated only

that the words "immoral or profligate life" ". . . were defined in a general way by this court in *Davenport* v. *District of Columbia* [*supra*], and we see no occasion to repeat or elaborate upon that definition. . . ." In fact, the attempted definition in *Davenport* is merely a collection of equally vague synonyms and antonyms which, in at least two important respects, have even broadened the coverage of Subsection 3. It might have been supposed that "immoral" could have been confined to matters of sexual perversion, but *Davenport* states that it "is not necessarily confined to matters sexual in their nature." It also might have been supposed that the determination of what is "immoral" would be made as nonsubjective as possible, but *Davenport* says that this is to be determined by what is "contrary to conscience or moral law."

It is submitted that a fair and frank reading of the *Davenport* definition shows conclusively why Subsection 3 is incurably vague. If it remains the authoritative interpretation of Subsection 3—continuing to authorize police and courts to imprison persons whose lives are found to be not "decent, upright, good, right"—then no statute can be vague or indefinite.

Pattern of Iniquity. Another purported limitation on the powers of the police and trial courts was enunciated in *Coley* v. *District of Columbia,* 177 A.2d 889, 891 (D.C. Munic. App. 1962):

> ". . . It is settled that vagrancy consists of a continued course of immorality, a pattern of iniquity, rather than a solitary instance of wrongdoing. . . ." (Footnote omitted.)*

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* The "pattern of iniquity" rule has also been applied in Hunt v. District of Columbia, 47 A.2d 783 (D.C. Munic. App. 1946),

This limitation, of course, does go to the meaning of "immoral or profligate." But its sole contribution is to require that the prosecutor allege and prove that the acts of the accused were more than an isolated occurrence. The police of the District of Columbia have interpreted this to mean that the prospective accused should have been subjected to three "observations" before an arrest is made under Subsection 3.* But the limitation does nothing to clarify the meaning of Subsection 3. In fact, it has precisely the opposite effect.

While there are instances in which the "pattern of iniquity" rule has been applied to reverse a vagrancy conviction under Subsection 3 because the evidence showed only an isolated occurrence, *e.g., Drew* v. *District of Columbia,* 187 A.2d 325 (D.C. App. 1963), it also has been invoked to justify the admission of "background" or "character" evidence which is said to demonstrate the continuing nature of the accused's vagrancy. See, *e.g., Coley* v. *District of Columbia,* 177 A.2d 889, 891 (D.C. Munic. App. 1962). Thus, an accused must now come to court prepared to defend the "morality and rectitude" of his entire recent life. For example, the information filed against petitioner in the present case charged that on the "19th day of May," 1963, petitioner "was then and there and still is a vagrant

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affirmed, 82 D.C. App. 159, 163 F.2d 833 (1947) (joinder of defendants improper: "A condition personal to a given individual is not the same as a condition personal to another even though each such condition is evidenced by particulars of conduct described in the same words." 163 F.2d at 836); and Drew v. District of Columbia, 187 A.2d 325 (D.C. App. 1963).

* Letter from Metropolitan Police Chief John B. Layton to Mr. David Carliner, Chairman of the National Capital Area Civil Liberties Union, dated March 26, 1965. The text of the letter is set out in Appendix C hereto.

. . .," and continued with a minimal recitation of the charges of immorality and profligacy. The specific acts or traits of petitioner's existence which could be relied upon to prove his vagrancy could have been taken from any point in time during the period from May 19 through June 12, 1963, the day he was arrested and charged. In order to defend against the charge, therefore, petitioner would have had to be prepared to explain to the satisfaction of the police court judge any such act or trait which appeared—or which was said to have appeared—during this time. See, *e.g., Coley* v. *District of Columbia,* 177 A.2d 889 (D.C. Munic. App. 1962), where the brief observations which were held to supply adequate evidence for conviction were made on March 26, 1960; June 4, 1960; November 26, 1960; and January 28, 1961. It is rare indeed that the typical vagrancy defendant would be prepared to counter such a showing.

Prevention of Crime. In *Clark* v. *District of Columbia,* 34 A.2d 711, 713 (D.C. Munic. App. 1943) (conviction under § 22-3302(1)), speaking of the vagrancy statute as a whole, the court stated that:

> "Our statute, like other vagrancy statutes, is in the nature of a police regulation to prevent crime, and was enacted for the enforcement of good order and public safety. . . . The statute must be construed in light of the purpose for which it was enacted, namely, to prevent crime. . . ." (Footnotes omitted.)*

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* See also District of Columbia v. Hunt, 82 App. D.C. 159, 163 F.2d 833, 835 (1947), *affirming* 47 A.2d 783 (D.C. Munic. App. 1946); Harris v. District of Columbia, 192 A.2d 813, 816 (D.C. App. 1963).

The statement in Drew v. District of Columbia, 187 A.2d 325, 326 (D.C. App. 1963), quoted with approval in Golden v. District of Columbia, 210 A.2d 2, 4 (D.C. App. 1965), that evidence of

As noted in the opinion in the *Clark* case, 34 A.2d at 712 n.3, the House Report accompanying the bill which became the present vagrancy statute also stated that "The measure as drafted is directed primarily to persons who are potentially a menace to the community." (H.R. REP. No. 1248, 77th Cong., 1st Sess. (1941)).

The meaning of this appears to be that Subsection 3 makes criminal the leading of a life which may lead to crime. But it cannot seriously be maintained that this "limitation" imposes any operable boundaries to the words "immoral or profligate." Even if it is supposed that each judge administering Subsection 3 is fully conversant with the theory and practice of effective crime prevention (a supposition belied at least by the current frustration over the mounting rate of crime), it does not follow that citizens who would obey the law would possess the same wisdom so as to avoid (if they could) the type of "immoral or profligate" life which any judge thinks will lead to crime. Moreover, many of the commonly recognized causes of crime defy control by persons subjected to them. Poverty, membership in certain minority groups, lack of education, poor housing, insufficient parental control, and many other factors lead to crime. Does Subsection 3 forbid the leading of lives in which these factors appear? If so, must it be shown that the defendant has wilfully led such a life? If not, do these factors excuse an "immoral or profligate" life? Where social scientists differ as to the causative nature of these attributes, which school of thought is to be followed? It is submitted that the prevention-of-crime limi-

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vagrancy consists in "a course of conduct or mode of living or status prejudicial to the public welfare . . .," seems to relate to the same purpose of crime prevention, etc., mentioned in the *Clark* case, *supra*.

tation raises more questions than it answers. It is not an effective limitation on the scope of Subsection 3.

B. The Void-for-Vagueness Doctrine Condemns as Unconstitutional the Standard "Immoral or Profligate Life" in Subsection 3.

The question that remains is whether, in the light of its history and judicial explication, the words of Subsection 3 possess the clarity required by the principles of due process embodied in the void-for-vagueness doctrine.

It should first be noted that the constitutional problems in Subsection 3 and other vagrancy statutes have not led to extensive appellate challenge precisely because of the condition of the class of persons against which they are directed. See Note, *Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons,* 59 Yale L.J. 1351, 1357 n.21 (1950). The constitutionality of Subsection 3 itself has not been determined prior to this case. The Court of Appeals of the District of Columbia has stated in its opinion in this case below that "in at least two instances this court has held the act in question to be constitutional," citing *Thomas* v. *District of Columbia,* 161 A.2d 52 (D.C. Munic. App. 1960); and *Rogers* v. *District of Columbia,* 31 A.2d 649 (D.C. Munic. App. 1943). The only relevant portion of the *Thomas* opinion stated that:

> "Appellant's second point is that the statute under which she was prosecuted is unconstitutional. This question was not raised at trial and is not properly before us. If it were, we would have no hesitation in ruling that the point is without merit." (161 A.2d at 53)

This manifestly is no answer to the present petitioner's objections. There is no indication whether the same subsection of the vagrancy statute or the same constitutional grounds were being considered. In any event, the court expressly declined to pass upon the unmentioned issues and its concluding elliptical remark can at most be only dictum. The *Rogers* decision is also entirely inapposite. While the conviction in that case was obtained under Subsection 3, the only constitutional objections presented or decided upon concerned what are now Sections 22-3303 and 11-616 of the District of Columbia Code which deal with the burden of proof and the right to a jury trial. The present petitioner's attack is directed against Subsection 3 itself, the constitutionality of which has never before now been decided by any court.*

1) *The Doctrine and Its Rationale*

The test used by the Federal courts to determine whether particular statutory language is or is not void because of its indefiniteness has been concisely set out in the leading case of *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926):**

> "That terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render

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* It also appears that the constitutionality of the other "immoral-profligate-worthless" vagrancy statutes discussed above has never been authoritatively determined. An excellent discussion of constitutional litigation involving other vagrancy statutes can be found in Dubin & Robinson, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L. REV. 102, 121-33 (1962).

** The precise configurations of the void-for-vagueness doctrine have been carefully examined in Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. . . ."

This doctrine and its rationale are familiar to the courts of the District of Columbia, despite the impression which might have been created by the decisions below. As long ago as 1905, the Court of Appeals of the District of Columbia expounded these principles in the following statement which has lost none of its vitality by the passage of time:

"In all criminal prosecutions the right of the accused to be informed of the nature and cause of the accusation against him is preserved by the 6th Amendment. In order that he may be so informed by the indictment or information presented against him, the first and fundamental requisite is that the crime or offense with which he stands charged shall be defined with reasonable precision. He must be informed by the law, as well as by the complaint, what acts or conduct are prohibited and made punishable. In the exercise of its power to regulate the conduct of the citizen, within the constitutional limitations, and to declare what shall constitute a crime or punishable offense, the legislature must inform him with reasonable precision what acts are intended to be prohibited. 'Every man should be able to know with certainty when he is committing a crime.' United States v. Reese, 92 U.S. 214, 220, 23 L. ed. 563,

> 565. This obvious duty must be performed by the legislature itself, and cannot be delegated to the judiciary. It may, doubtless, be accomplished by the use of words or terms of settled meaning, or which indicate offenses well known to and defined by the common-law. Reasonable certainty, in view of the conditions, is all that is required, and liberal effect is always to be given to the legislative intent when possible. But when the legislature declares an offense in words of no determinate signification, or its language is so general and indefinite as that it may embrace within its comprehension, not only acts commonly recognized as reprehensible, but others also which it is unreasonable to presume were intended to be made criminal, the courts, possessing no arbitrary discretion to discriminate between those which were and those which were not intended to be made unlawful, can do nothing else than declare the statute void for its uncertainty. *United States* v. *Reese,* 92 U.S. 214, 221, 23 L. ed. 563, 566. As was said in that case: 'It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.'" *Czarra* v. *Board of Medical Supervisors,* 25 App. D.C. 443, 450-51 (1905).

The court in *Czarra* was faced with the question of the constitutionality of a statute permitting the revocation of a license to practice medicine because of "unprofessional or dishonorable conduct." In the course of striking down

the statute because of its vagueness, the court enunciated the following standard for testing such legislation:

> "Doubtless all intelligent and fair-minded persons would agree in the opinion of the board of medical supervisors that the act charged against the appellant in the case at bar amounted to conduct both unprofessional and dishonorable. But this is not the test of the validity of the particular clause of the statute. The underlying question involved in all cases that may arise is whether the courts can uphold and enforce a statute whose broad and indefinite language may apply not only to a particular act about which there would be little or no difference of opinion, but equally to others about which there might be radical differences, thereby devolving upon the tribunals charged with the enforcement of the law the exercise of an arbitrary power of discriminating between the several classes of acts." (25 App. D.C. at 453)

Still another instance of the use of this doctrine by the District of Columbia courts is *United States* v. *Capital Traction Co.*, 34 App. D.C. 592 (1910). There the court held unconstitutionally vague an Act of Congress which made it a misdemeanor for a street railway to fail to operate a "sufficient number" of cars to prevent "crowding." It should be noted that although *Capital Traction* was a criminal case, the statute only provided for a fine, and *Czarra,* upon which the court relied so heavily, was only a civil proceeding. Thus the constitutional demands articulated by these cases must be viewed all the more stringently in the context of the instant case which involves a statute providing for imprisonment as well as a fine. As stated by this Court in *Winters* v. *New York,* 333 U.S. 507, 515

(1948): "... The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement...."

The same passage in the *Winters* decision continues with an instructive delineation of the types of vagueness which may infect a statute (333 U.S. at 515-16):

> "... The crime 'must be defined with appropriate definiteness,' *Cantwell* v. *Connecticut*, 310 U.S. 296; *Pierce* v. *United States*, 314 U.S. 306, 311. There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act, *Lanzetta* v. *New Jersey*, 306 U.S. 451, or in regard to the applicable tests to ascertain guilt." (Footnotes omitted.)

So measured, the vice of the words "any person leading an immoral or profligate life" in Subsection 3 is two-fold. They neither tell what persons are subject to arrest nor do they supply a reasonably ascertainable standard of guilt. They are words to which meaning can be assigned only by means of a totally subjective appeal to judgment. They are verbal symbols, to use the language of semanticists, which have no external object-referents. See Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 91 (1960). They are words which no court decision has been able to clarify because by their very nature they demand that the prejudices and moral predilections of each individual be employed to supply meaning in any particular case.

2) *Judicial Authority Bearing Directly on Subsection 3*

It has already been seen that the veil of uncertainty which enshrouds the words "immoral or profligate" is not lifted—but is, in fact, made still more impenetrable—by an examination of the legislative and judicial history of Subsection 3. Nor is anything else available to advance understanding of their meaning. It is true, of course, that words may have more precise significance in one context than in another. *Winters* v. *New York,* 333 U.S. 507, 518 (1948). And if the words in question can be said to have a well-recognized and long-standing specific interpretation based either upon their well-established usage and understanding in the common law or upon their settled meaning in a technical field, then mere surface ambiguity will not cause such words to be void because of their vagueness. See *Champlin Ref. Co.* v. *Corporation Comm'r,* 286 U.S. 210, 242-43 (1932). But these guides to meaning are of no avail for the attempted validation of Subsection 3. Its area of operation is plainly not a technical field where widespread and carefully controlled usage might supply the meaning which the words themselves lack. It is just as plain, as has already been seen, that the common-law history sheds no light. And the available judicial authority quite clearly requires the rejection of such indefinite words as standards by which to judge the criminality of conduct.

Preeminent among these authorities is *Musser* v. *Utah,* 333 U.S. 95 (1948). In *Musser,* the appellants, members of a religious sect which practiced and advocated polygamy, had been convicted in the state courts of violating Utah Code Ann. § 103-11-1(5) (1943). This law made it a crime to conspire "to commit any act injurious . . . to public

morals . . . ." * During the oral argument in this Court, inquiries by the Court suggested that a question existed as to whether the quoted words were not unconstitutionally vague. Reargument directed to this specific issue was had upon the request of the state and this Court determined that the issue was such that the Utah Supreme Court should first pass upon it. In the course of its opinion directing remand, the Court characterized the "public morals" statute as follows (333 U.S. at 96-97):

> "It is obvious that this is no narrowly drawn statute. We do not presume to give an interpretation as to what it may include. Standing by itself, it would seem to be warrant for conviction for agreement to do almost any act which a judge or jury might find at the moment contrary to his or its notions of what was good for . . . morals . . . . [We would inquire] whether the statute attempts to cover so much that it effectively covers nothing. Statutes defining crimes may fail of their purpose if they do not provide some reasonable standards of guilt. . . . Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused."

In light of these words, the Utah Supreme Court on remand unanimously held that the statute was unconstitutionally vague and reversed the convictions, *Musser* v. *State,* 118 Utah 540, 223 P.2d 193, 194 (1950), stating that:

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* This section of the Utah statute has not been repealed since and is found now at UTAH CODE ANN. § 76-12-1(5) (1953). No further attempt to apply the subsection has apparently been made.

> " . . . The argument before this court has developed no reason why we should believe that the legislature intended, in using this language, that it should be limited to a meaning less broad than the words therein used would indicate in their ordinary sense. No language in this or any other statute of this state or other law thereof or any historical fact or surrounding circumstance connected with the enactment of this statute has been pointed to as indicating that the legislature intended any limitation thereon other than that expressed on the face of the words used. We are therefore unable to place a construction on these words which limits their meaning beyond their general meaning. The conviction of the defendants thereunder cannot be upheld. This part of the statute is therefore void for vagueness and uncertainty under the Fourteenth Amendment to the Federal Constitution."

In addition to the *Musser* case, this Court in *Superior Films, Inc.* v. *Department of Educ.*, 346 U.S. 587 (1954) (per curiam), has unanimously held unconstitutional a motion picture censorship statute (OHIO GEN. CODE § 871-49) which attempted to prohibit the licensing of any film which, in the opinion of the board of censors, was not "of a *moral,* educational or amusing and harmless character." (Emphasis supplied.) A companion case, *Commercial Pictures Corp.* v. *Regents,* (No. 274), decided together with the *Superior Films* case, held unconstitutional that portion of Section 122 of the NEW YORK EDUCATION LAW which permitted the banning of films which were "immoral" or which "tended to corrupt morals." Both cases were decided solely on the authority of *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495 (1952). In *Burstyn,* the Court had held that the portion of Section 122 of the NEW YORK EDUCATION LAW which

permitted the banning of "sacrilegious" films was unconstitutional as a prior restraint on the freedoms of speech and press. The Court was especially plain-speaking in its views of the meaning of "sacrilegious" as that term had been defined by the state courts:

> "New York's highest court says there is 'nothing mysterious' about the statutory provision applied in this case: 'It is simply this: that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule. . . .' This is far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society. In seeking to apply the broad and all-inclusive definition of 'sacrilegious' given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies. New York cannot vest such unlimited restraining control over motion pictures in a censor. . . . " (343 U.S. at 504-05).*

If the Court in *Burstyn* found the term "sacrilegious" too indefinite, it certainly must be understood to have concluded the same thing in *Superior Films* and in *Commercial Pictures* with respect to the terms "moral" and "immoral." For, as already seen, morality covers such a vast area that sacrilege, expansive as that term may be of itself, would be lost within it.

Two other separate pronouncements by members of this Court, although not speaking for the Court as a whole,

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* See also the concurring opinion of Justice Frankfurter, 343 U.S. at 518 *et seq.*

are strongly persuasive of the unconstitutional vagueness of Subsection 3. It will be noted that in neither of these instances were these views of the individual Justices in disagreement with the views of a majority of the Court. In each instance, consideration of the vagueness issue either was not thought by the majority to be necessary to its decision or was disposed of in a manner that certainly would have encompassed the individual views expressed.

First in point of time is the dissenting opinion of Justice Frankfurter, joined by Justices Jackson and Burton, in *Winters* v. *New York,* 333 U.S. 507, 520 (1948). The majority of the Court had struck down a New York statute which made criminal the possession of certain magazines " . . . principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime. . . . " The dissenting Justices would have held this statute constitutional. In his dissenting opinion, Justice Frankfurter set out his views on the standards for determining whether a statute was unconstitutionally vague. In fact, his proposed standard (which has never been accepted by a majority of the Court) was so self-limiting that two commentators have expressed the view that its adoption would have made the void-for-vagueness doctrine inapplicable in all but the extraordinary case. Dubin & Robinson, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality,* 37 N.Y.U.L. Rev. 102, 122 n.116 (1962). Nonetheless, there were certain cases where the doctrine (under this stricter standard) would still have been applicable. Within this dissenting opinion Justice Frankfurter sought to distinguish the cases upon which the majority opinion had relied and his comments with respect to one case involving a vagrancy-type statute are especially pertinent:

"Only a word needs to be said regarding *Lanzetta* v. *New Jersey,* 306 U.S. 451. The case involved a New Jersey statute of the type that seek to control 'vagrancy.' *These statutes are in a class by themselves, in view of the familiar abuses to which they are put.* See Note, 47 Col. L. Rev. 613, 625. *Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense.* In short, these 'vagrancy statutes' and laws against 'gangs' are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided." (333 U.S. at 540) (Emphasis supplied.)

These words of Justices Frankfurter, Jackson and Burton do not stand alone. Justices Black and Douglas firmly scored the unconstitutional vagueness of the typical vagrancy statute in *Edelman* v. *California,* 344 U.S. 357, 362 *et seq.* (1953) (dissenting opinion). The majority did not reach the merits of the constitutional questions presented since they found that there were adequate non-constitutional grounds for affirming the state court. Justices Black and Douglas dissented on the ground that there was no valid, independent basis for the action of the state court. They thus reached the merits of the statute's constitutionality.

Edelman, who was a street orator of the radical left, had been arrested and convicted of vagrancy under Section 647 (5) of the California Penal Code. The statute provided that "every idle, or lewd, or dissolute person, or associate of known thieves" was a vagrant subject to the penalty of fine and/or imprisonment. The dissenting Justices noted

(344 U.S. at 364) the marked similarity between the California statute and the New Jersey statute struck down in *Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939). (The further similarity between both these state statutes and Subsection 3 is also obvious.) During Edelman's trial, the trial judge had instructed the jury as to the meaning of the word "dissolute" in the vagrancy statute by quoting from the dictionary. (Compare the equally dubious dictionary definition given by the court as the meaning of "immoral or profligate" in *Davenport* v. *District of Columbia,* 61 A.2d 486, 488 (D.C. Munic. App. 1948).) Commenting upon this dictionary definition, the dissenting Justices stated that:

> ". . . The dictionary definition of dissolute given to the jury by the court described a crime of such nebulous amplitude that no person could know how to defend himself. . . ." (344 U.S. at 365)

In conclusion, the dissenting Justices condemned the California statute as unconstitutional because of its fatal vagueness and indefiniteness. Their words in this respect are as applicable to Subsection 3 of the District of Columbia Code as they were to Subsection 647(5) of the California Code:

> "It would seem a matter of supererogation to argue that the provision of this vagrancy statute on its face and as enforced against petitioner is too vague to meet the safeguarding standards of due process of law in this country. . . ." (344 U.S. at 365)

Events have vindicated the views of Justices Black and Douglas. The former vagrancy provisions of Cal. Pen. Code § 647 (West Ann. 1955), under which the *Edelman* case arose, were repealed by Cal. Stats. 1961, c. 560, § 1.

One of the most notable omissions from the new CAL. PEN. CODE § 647 (West Ann. Supp. 1964) which was added by Cal. Stats. 1961, c. 560, § 2, to replace the old vagrancy provisions, is the subsection they had found to be constitutionally objectionable. See generally, Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision,* 48 CALIF. L. REV. 557 (1960). In California, therefore, the problems which gave rise to the *Edelman* dissent have now been put to rest. They live on in Subsection 3.

The *Edelman* case and the vagrancy provision involved in it—which is not at all unlike the provision in question here—have been commented upon by Professor Amsterdam in his definitive note on *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67, 91 n.120 (1960), in the following words:

> "... It may be suggested that *Edelman* represents in a single disquieting image all of the evils which justify the constitutional void-for-vagueness doctrine. Here is the coercive force of society run loose at the whim of prosecutor and jury, without adequate restraint at the level of the trial court (for want of standards by which to restrain), enforced against indigent and unrepresented defendants unable to assure in their own defense the adequate preservation of a trial record or the rulings of the court on their federal issue, unlikely—even if a federal issue should be raised—to know or be able to take that issue to a federal court."

This description could just as aptly be applied to Subsection 3. If the term "dissolute" is an inadequate standard, then "immoral or profligate" certainly is. If the defendant in *Edelman* was indigent and unrepresented, so is virtually every person processed by means of Subsection 3

through the Criminal Division of the District of Columbia Court of General Sessions. For most defendants in such a police court, any meaningful form of trial record is rarely preserved.* Appeal is difficult, expensive, vexatious and time-consuming even in the rare case where it is attempted. These circumstances effectively insulate the police court from appellate guidance or scrutiny and make even more critical the necessity for adequate standards of determining whether a vagrancy offense has occurred.

3) *Evils Resulting from the Vagueness of Subsection 3*

It cannot seriously be gainsaid that vaguely written vagrancy statutes such as Subsection 3 have given rise to police abuses which in many instances are a scandal to the Constitution. These objectionable practices customarily include at least the following:

1. Arrest for vagrancy can be employed as a legal justification for detention on suspicion alone when the real objective is to gather information about other crimes the suspect may have committed.

2. If a person is suspected of having already committed another crime which cannot be proved, the vagrancy charge can be used to "punish" the suspect.

3. The vague words can be stretched or relaxed, as needed, in order to incarcerate or otherwise institutionalize persons not otherwise subject to legal process but whom police and magistrate believe should be removed from the body of the public.

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* There is no provision in statutory law or in the Rules of the District of Columbia Court of General Sessions requiring a written transcript or statement of the evidence in a prosecution for vagrancy in the District. If the defendant wishes a transcript, he must have it prepared at his own expense.

4. Where lax court practices permit, the police may employ the vagrancy statute to vindicate supposed affronts which do not amount to abuse of an officer or a similar, statutorily defined offense.

The widespread existence of these and similar practices is undeniable. They have been reliably and elaborately documented.*

Who can say with certainty that abuses such as these would never be perpetrated in the over-burdened police courts of the District of Columbia? Even were the risk comparatively remote, the Constitution should not be held to countenance putting citizens to this risk. The very purpose of the Due Process Clause would seem to be to ensure that citizens will be secure in their persons and in their possessions from the excesses and abuses of governmental authority. Respondent would assure the Court that these abuses, whatever might be their prevalence in other jurisdictions, never occur in the District of Columbia. Respondent in the past has labeled them as pure conjecture supported by no fact of record. But the complete answer to such assurances was given by this Court only a year ago in *Baggett* v. *Bullitt*, 377 U.S. 360, 373 (1964), where, in response to a similar contention by another governmental authority, the Court replied:

" . . . It may well be correct, but the contention only emphasizes the difficulties with the two statutes; for

* See, *e.g.*, Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960); Dubin & Robinson, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L. REV. 102 (1962); Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956); Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953); Note, *Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons*, 59 YALE L.J. 1351 (1950), and the numerous authorities cited in each.

> if the oaths [which the statutes required] do not reach some or any of the behavior suggested, what specific conduct do the oaths cover? *Where does fanciful possibility end and intended coverage begin?*" (Emphasis supplied.)

Examples of possible police abuses and excesses are also suggestive of another, related ground upon which it must be said that Subsection 3 is void for vagueness. This Court has often said that a statute violates the Due Process Clause of the Fourteenth Amendment if it is so vague and indefinite that it permits the punishment of acts which are within the protection of the First Amendment. See *Winters* v. *New York,* 333 U.S. 507, 509 (1948); *Stromberg* v. *California,* 283 U.S. 359, 369 (1931); *Herndon* v. *Lowry,* 301 U.S. 242, 258 (1937). Indeed, "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech." *Smith* v. *California,* 361 U.S. 147, 150-51 (1959). And since *Bolling* v. *Sharpe,* 347 U.S. 497 (1954), it is undisputed that the Due Process Clause of the Fifth Amendment imposes at least the same restrictions upon the federal government as the Due Process Clause of the Fourteenth Amendment imposes upon the states. As this Court stated in *Bolling,* " . . . it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." (347 U.S. at 500) It follows, therefore, that if the statutory words "immoral or profligate life" used by Congress in Subsection 3 are so vague and indefinite that they permit the punishment of acts which are protected by the First Amendment, then the statute violates the Due Process Clause of the Fifth Amendment.

Freedom of Speech and Freedom of Assembly. By way of illustration, the language of Subsection 3 is broad enough

to permit the arrest and conviction of a member of the American Nazi Party who is peaceably giving a speech on the beliefs of that organization. But *Terminiello* v. *Chicago*, 337 U.S. 1 (1949); and *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), make it clear that if the speech does not incite to violence, the speaker would have a clear right under the First Amendment to speak unhindered. His arrest and conviction under Subsection 3 would violate that right. This, of course, is only one of many examples which could be supposed of possible violations of constitutionally protected freedom of speech by the use of Subsection 3.

Suppose again that a meeting of an extreme racist group were held to discuss peaceful ways to further their cause. Again, a policeman and a judge might believe that the advocacy of racial hatred was "immoral" under the dictionary definition given in *Davenport* v. *District of Columbia*, 61 A.2d 486, 488 (D.C. Munic. App. 1948). In good faith they could thus arrest and convict the participants for vagrancy. Cases such as *Hague* v. *C.I.O.*, 307 U.S. 496 (1939), however, are clear in their teaching that such a use of governmental power would violate the participants' constitutionally protected freedom of assembly.

There is clear proof in the legislative history of the District of Columbia vagrancy statute that these possibilities cannot be dismissed as imaginary. While many of the details unfortunately are not available, there apparently was some confusion in Congress over the scope of the District of Columbia vagrancy statute before it was finally enacted. On August 13, 1941, H.R. 5448 was brought before the House of Representatives for a vote. Just before the vote was taken, however, the sponsor of the measure, Congressman Schulte, tacked onto the bill the following proviso:

> "Nothing in this act shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right to picket." (87 CONG. REC. 7081)

This same language is found as Section 6 of the act which ultimately became law (see 55 Stat. 810) and has been codified as Section 22-3306 of the District of Columbia Code.* This proviso is at least a tacit admission by Congress that the statute was written in broad and all-inclusive language without any significant attempt to delineate carefully the types of conduct which were to be prohibited in the first place. This was why it had proved necessary to rescue from the statute's broad sweep a certain class of persons—the members of organized labor who, unlike those at whom the statute is now generally directed, were capable of mounting an effective objection to the possibility of police interference with their legitimate activities. By itself, the proviso furnishes a complete answer to any argument that Congress intended to use anything but the most imprecise language or that Congress had a specific, narrowly limited set of factual situations in mind when the law was enacted.

Freedom of Religion. Perhaps the most serious vice inherent in the vagueness of Subsection 3 is the fact that its great breadth permits—in fact, requires—the police and the courts to employ their own notions of religious morality and ethics in determining which persons and conduct are subject to the statute.

The concept of "immoral" conduct is pregnant with religious meanings of various significance for different per-

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* Compare the section of the Alabama vagrancy statutes (ALA. CODE tit. 14, § 440 (1940)) which expressly provides that they "shall not apply to persons who are idle because of strikes or lockouts."

sons. The varieties of this religious significance are obvious from the definition given in WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d Ed.) which was paraphrased by the local appellate court in *Davenport* v. *District of Columbia*, 61 A.2d 486, 488 (D.C. Munic. App. 1948):

> "Not moral; inconsistent with rectitude, purity, or good morals; *contrary to conscience or moral law;* wicked; vicious, licentious; as an immoral man or deed. Syn.: Corrupt, indecent, depraved, dissolute. Cf. Bad. Ant.: Decent, upright, good, right. See Moral." (Emphasis supplied.)

The emphasized phrase "contrary to conscience or moral law" epitomizes the dual constitutional vice in the statutory langauge. On the one hand, the statute refers the policeman and the judge to their own consciences for the standard of judgment. Their consciences, and only their consciences, become the law, and of course it is impossible for those who would attempt to obey the law to anticipate what will be the conscientious dictates of individual policemen and judges. On the other hand, a policeman or judge who recognizes the arbitrariness implicit in imposing his own moral predilections upon the public must rely instead upon some exterior moral system or code which he can feel is objective and fairly consistent. But here again there are many vastly different moral codes, and by the very act of choosing one over others the policeman or judge is making one system compulsory for all citizens who come within his jurisdiction.

This is a constitutionally objectionable "establishment of religion" in a pristine form. The fact that recent cases such as *Engel* v. *Vitale*, 370 U.S. 421 (1962) (Regents' prayer); and *Abington Township* v. *Schempp*, 374 U.S. 203 (1963) (bible reading), have dealt with the exteriors of

religion and not with basic religious doctrine does not obscure the obvious fact that compulsory religious exercises are proscribed because they may easily lead to compulsory religious dogma. This is clear from a reading of the recent cases. Thus, in the *Abington Township* v. *Schempp* case, *supra* at 217-18, this Court cited with approval the language of Justice Roberts in *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940), discussing the interrelationship of the Establishment and Free Exercise Clauses:

> " . . . On the one hand, *it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship.* Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. . . . " (Emphasis supplied.)

Nor does the fact that it is possible under Subsection 3 to have a proliferation of moral codes—each policeman and each judge choosing his own—avoid the constitutional prohibition. The contention is rejected summarily in *Abington Township* v. *Schempp*, *supra* at 216:

> " . . . [T]his Court has rejected unequivocally the contention that the establishment clause forbids only governmental preference of one religion over another. Over twenty years ago in . . . [Everson v. Board of Education, 330 U.S. 1, 15 (1947)] . . . the Court said that '[n]either a state nor the Federal government can set up a church. *Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.*'" (Emphasis supplied.)

In short, whether it be supposed that policemen and judges of the District of Columbia are imposing their own

religious standards or those of someone else when they enforce Subsection 3, the result is the same. Citizens are being involuntarily subjected to religion. Thus to deny their freedom of religion is unconstitutional.

Conclusion

Subsection 3, which forms the sole basis for petitioner's conviction, is unconstitutional under the void-for-vagueness doctrine. Petitioner prays, therefore, that the order of the United States Court of Appeals for the District of Columbia Circuit denying his petition for allowance of an appeal be set aside, and that that court be directed to reverse the judgments of the courts below.

Respectfully submitted,

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APPENDIX A

State Vagrancy Legislation

A statutory definition of vagrancy appears in D. C. CODE § 22-3302 (1961 Ed.) and in the statutes of 40 states: ALA. CODE tit. 14, § 437 (1940); ALASKA STAT. ANN. § 11.60.210 (Michie 1962); ARIZ. REV. STAT. §§ 13-991–13-993 (1956); ARK. STAT. ANN. §§ 41-4301, 41-4303 (1964); COLO. REV. STAT. ANN. § 40-8-19 (1963); CONN. GEN. STAT. § 53-340 (1958); DEL. CODE § 11-881 (1953); FLA. STAT. § 856.02 (1941); GA. CODE ANN. § 26-7001 (1935); HAW. REV. LAWS § 314-1 (1955) (continued in force by HAW. CONST. Art. XVI, § 2 HAW. REV. LAWS (Supp. 1964)); IDAHO CODE ANN. § 18-7101 (1948); IND. ANN. STAT. § 10.4602 (Burns 1956); IOWA CODE ANN. § 746.1 (1950), as amended (Supp. 1964); KAN. STAT. ANN. § 21-2409 (1964); KY. REV. STAT. § 436.520 (1963); LA. REV. STAT. ANN. § 14:107 (Supp. 1964); MASS. GEN. LAWS c. 272, § 66 (West 1959); MINN. STAT. ANN. § 609.725 (West 1964); MISS. CODE ANN. § 2666 (1942); MO. REV. STAT. § 563.340 (1949); MONT. REV. CODE ANN. § 94-35-248 (1947); NEB. REV. STAT. § 28-1119 (1943); NEV. REV. STAT. § 207.030 (1963); N. M. STAT. ANN. § 40A-20-5 (1963); N. Y. CODE CRIM. PROC. § 887; N. C. GEN. STAT. § 14-336 (1953); N. D. REV. CODE § 12-42-04 (1943); OKLA. STAT. tit. 21, § 1141 (1951); ORE. REV. STAT. § 166.060 (1963 Repl. Part); PA. STAT. ANN. tit. 18, § 2032 (1963); S. C. CODE § 16-565 (1962); S. D. CODE § 13.1424 (1939); TENN. CODE ANN. § 39-4701 (1956); TEX. PEN. CODE ANN. art. 607 (Vernon 1952); UTAH CODE ANN. § 76-61-1 (1953); VT. STAT. ANN. tit. 13, § 3901 (1958); VA. CODE § 63-338 (1950); WASH. REV. CODE § 9.87.010 (1951); WIS. STAT. § 947.02 (1955); WYO. STAT. ANN. § 6-221 (1957).

The following states have statutes punishing offenses under other names which are commonly known as vagrancy in the states listed above: ME. REV. STAT. c. 137, § 41 (Cum. Supp. 1963); N. H. REV. STAT. ANN. § 570:25 (Supp. 1963); N. J. STAT. ANN. §§ 2A:170-1, -2, -4 (1953); R. I. GEN. LAWS

§ 11-45-1 (Supp. 1962) and §§ 11-2-1, 11-34-5, 11-45-3, 11-45-10 1956).

Michigan's "disorderly persons" statute, MICH. STAT. ANN. § 28.364 (1962), includes "vagrants" but under other descriptions also lists persons who would be within the definition of vagrancy in many of the other states.

In Ohio, municipalities are expressly given the power to punish "vagrancy," OHIO REV. CODE ANN. § 715.55(b) (1953).

West Virginia does not mention vagrancy in its statutes.

In California, the former vagrancy provisions in CAL. PEN. CODE § 647 (West. Ann. 1955) were repealed by Cal. Stats. 1961, c. 560, § 1. The new CAL. PEN. CODE § 647 (West Ann. Supp. 1964) was added by Cal. Stats. 1961, c. 560, § 2. It prohibits only specific acts—not general conduct or status—under the denomination of "disorderly conduct." In addition, CAL. PEN. CODE § 647a (West Ann. Supp. 1964) continues the description of "vagrant" for a person committing the specific act of annoying or molesting a child under eighteen years or of loitering about schools. See Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts In Need of Revision,* 48 CALIF. L. REV. 557 (1960), which proposed the new legislation in substantially its enacted form.

Illinois' vagrancy statute, ILL. ANN. STAT. c. 38, § 578 (1935), was repealed by ILL. ANN. STAT. c. 38, § 35-1 (Smith-Hurd 1964), known as the Criminal Code of 1961, and was not replaced.

Maryland's vagrancy statute, MD. ANN. CODE GEN. LAWS art. 27, §§ 664, 665 (1951), was repealed by Laws 1953, c. 411, and not replaced.

APPENDIX B

Representative Dictionary Entries for "Immoral" and "Profligate"

WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d Ed. 1961):

"Immoral"—not moral: inconsistent with purity or good morals: contrary to conscience or moral law: wicked, licentious (an—man) (such—acts); broadly: opposed to, critical of, or in conflict with generally or traditionally held moral principles. . . .

"Profligate"—adj. 1. completely given up to dissipation and licentiousness: abandoned to vice and corruption: shamelessly immoral; 2. wildly extravagant: criminally excessive in spending or using: recklessly wasteful.

FUNK & WAGNALLS STANDARD DICTIONARY (International Edition 1958):

"Immoral"—adj. 1. violating the moral law; contrary to rectitude or public morality. 2. habitually licentious. . . . Synonyms: bad, corrupt, criminal, depraved, dishonest, dissolute, evil, loose, profligate, sinful, unprincipled, vicious, vile, wicked, wrong. See bad, criminal, sinful. Antonyms: chaste, devout, dutiful, godly, good, just, moral, pious, pure, religious, righteous, upright, virtuous, worthy.

"Profligate"—adj. 1. lost or insensible to principle, virtue, or decency; abandoned to vice. 2. recklessly extravagant; in great profusion. . . . See synonyms under immoral.

BALLENTINE'S LAW DICTIONARY (1948 Ed.):

"Immoral"—Hostile to the welfare of the general public; having a tendency to mischievous or pernicious consequences.

"Profligate"—no entry.

RADIN'S LAW DICTIONARY (1955):

"Immoral"—contrary to the accepted standards of moral conduct, whether illegal or not; obscene, indecent. It is used

most frequently of illicit sex relations, but is much broader in scope, applying also to contracts which are void because of immoral consideration. Double-dealing and over-reaching, even when not amounting to fraud, are characterized as immoral. Schuman v. Pickert, 277 Mich. 225, 269, N. W. 152.

"Profligate"—no entry.

BLACK'S LAW DICTIONARY (4th Ed. 1957):

"Immoral"—contrary to good morals; inconsistent with the rules and principles of morality; inimical to public welfare according to the standards of a given community, as expressed in law or otherwise. Exchange Nat. Bank of Fitzgerald v. Henderson, 139 Ga. 260, 77 S. E. 36, 37, 51 L. R. A. (N.S.) 549. Morally evil; impure; unprincipled; vicious; or dissolute. U.S. v. One Book, Entitled "Contraception," by Marie C. Stopes, D.C.N.Y., 51 F.2d 525, 527.

"Profligate"—no entry.

OXFORD ENGLISH DICTIONARY (1961 Reprint):

"Immoral"—a. The opposite of moral; not moral. 1. Not consistent with, or not conforming to, moral law or requirement; opposed to or violating morality; morally evil or impure; unprincipled, vicious, dissolute. (Of persons, things, actions, etc.) 2. Not having a moral nature or character; non-moral. Obs. rare.

"Profligate"—A. adj. I. 1. Overthrown, overwhelmed, routed. Obs. II. 2. Abandoned to vice or vicious indulgence; recklessly licentious or debauched; dissolute; extremely or shamelessly vicious. b. Recklessly prodigal, extravagant, or profuse.

WORLD BOOK ENCYCLOPEDIA DICTIONARY (1963 Ed.):

"Immoral"—adj. 1. morally wrong; wicked: Lying and stealing are immoral. 2. lewd; unchaste.

"Profligate"—adj 1. very wicked; shamelessly bad: a profligate wretch without any sense of principle, morality, or religion (Tobias Smollett). 2. recklessly extravagant.

APPENDIX C

Letter From Metropolitan Police Chief John B. Layton to David C. Carliner of the National Capital Area Civil Liberties Union

DISTRICT OF COLUMBIA

METROPOLITAN POLICE DEPARTMENT

March 26, 1965

Mr. David Carliner,
Chairman, National Capital Area
Civil Liberties Union,
Suite 803, 1101 Vermont Avenue, N.W.
Washington, D. C. 20005

Dear Mr. Carliner:

I have for acknowledgment your letter requesting further information relative to vagrancy arrests under Title 22, Section 3302 of the District of Columbia Code.

Statistics for the Fiscal Year 1964, indicate that the Precincts with the highest incidence of arrests for vagrancy, are the First, Second and Thirteenth. These three Precincts, along with the Tenth, record the highest incidence of Part I Criminal Offenses.

Precincts One, Two and Thirteen have been co-operating in the enforcement of the Vagrancy Statutes as it was found that persons under observation frequented all three Precincts. Co-ordination of effort has recently been extended to the Tenth Precinct area. This co-operation consists of an exchange of information and observations concerning activities of persons who attract police attention.

Precinct Commanding Officers, particularly those of the Precincts listed above, keep abreast of court decisions relating to vagrancy arrests and when a decision indicates a change in existing practices, they immediately bring it to the attention of the members of their Unit at one of the training sessions held at the Precinct level.

Successful prosecution of a charge of vagrancy usually depends on the number of observations made and type of evidence developed. The restrictions on making such observations are reflected under "Notes to Decisions", Title 22, Section 3302 of the District of Columbia Code as amended by Supplement VI, which is used as a guide in instruction to our personnel.

The usual number of observations to be made on each Paragraph of the Vagrancy Statute are as follows:

Paragraph one (persons known to be pickpockets, thieves, burglars, felons, etc.) An arrest can be made on one observation.

Paragraph two has been repealed.

Paragraph three (any person leading an immoral or profligate life, who has no lawful employment . . .) This Section is usually used in the suppression of prostitution, particularly the lone, unemployed female operating as a prostitute. In this type of case at least three observations are usually necessary.

Paragraph four (any person who keeps, operates, frequents, lives in, or is employed in any house or other establishment of ill fame . . .) This Paragraph is used primarily for the suppression of prostitution in disorderly houses and establishments of ill fame and at least three observations are usually necessary.

Paragraph five through nine require a minimum of five observations and, depending on the circumstances, we have made as many as fifteen observations before an arrest was made.

Trusting that this information will be of assistance, I am

Yours very truly,

/s/ John B. Layton
John B. Layton
Chief of Police.

JBL:H:m

APPENDIX D

Text of Statutes Involved

DISTRICT OF COLUMBIA CODE (1961 Ed.):

§ 22-3302. Vagrants defined.

The following classes of persons shall be deemed vagrants in the District of Columbia:

(1) Any person known to be a pickpocket, thief, burglar, confidence operator, or felon, either by his own confession or by his having been convicted in the District of Columbia or elsewhere of any one of such offenses or of any felony, and having no lawful employment and having no lawful means of support realized from a lawful occupation or source, and not giving a good account of himself when found loitering around in any public park, highway, public building, or other public place, store, shop, or reservation, or at any public gathering or assembly.

(2) Repealed. June 29, 1953, 67 Stat. 97, ch. 159, § 209.

(3) Any person leading an immoral or profligate life who has no lawful employment and who has no lawful means of support realized from a lawful occupation or source.

(4) Any person who keeps, operates, frequents, lives in, or is employed in any house or other establishment of ill fame, or who (whether married or single) engages in or commits acts of fornication or perversion for hire.

(5) Any person who frequents or loafs, loiters, or idles in or around or is the occupant of or is employed in any gambling establishment or establishment where intoxicating liquor is sold without a license.

(6) Any person wandering abroad and lodging in any grocery or provision establishment, vacant house, or other vacant building, outhouse, market place, shed, barn, garage,

gasoline station, parking lot or in the open air, and not giving a good account of himself.

(7) Any person wandering abroad and begging, or who goes about from door to door or places himself in or on any highway, passage, or other public place to beg or receive alms.

(8) Any person who wanders about the streets at late or unusual hours of the night without any visible or lawful business and not giving a good account of himself.

(9) And all persons who by the common law are vagrants, whether embraced in any of the foregoing classifications or not.

§ 22-3303. Prosecutions—Burden of proof to show lawful employment.

In all prosecutions under paragraphs 1 or 3 of section 22-3302 the burden of proof shall be upon the defendant to show that he has lawful employment or has lawful means of support realized from a lawful occupation or source.

§ 22-3304. Penalty—Conditions imposed by court.

Any person convicted of vagrancy under the provisions of sections 22-3303 to 22-3306 shall be punished by a fine of not more than $300 or imprisonment for not more than ninety days, or by both such fine and imprisonment, in the discretion of the court. The court may impose conditions upon any person found guilty under the aforesaid provisions and so long as such person shall comply therewith to the satisfaction of the court the imposition or execution of sentence may be suspended for such period as the court may direct; and the court may at or before the expiration of such period remand such sentence or cause it to be executed. Conditions thus imposed by the court may include submission to medical and mental examination, diagnosis, and treatment by proper public health and welfare authorities, and such other terms and conditions as the court may

deem best for the protection of the community and the punishment, control, and rehabilitation of the defendant. The director of public health of the District of Columbia, the Women's Bureau of the Police Department, the Board of Public Welfare, and the probation officers of the court are authorized and directed to perform such duties as may be directed by the court in effectuating compliance with the conditions so imposed upon any defendant.

§ 22-3306. Right to strike or picket not abrogated.

Nothing in sections 22-3302 to 22-3306 shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right to picket.